U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 January 2004

CASE NO.: 2003-LHC-833
OWCP NO.: 1-157280

In the Matter of

PATRICK W. CROWLEY
Claimant

v.

LOGISTEC OF CONNECTICUT, INC.
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION
Carrier

Appearances:

Gerald R. Rucci, Esquire, New London, Connecticut
for the Claimant

Peter D. Quay, Esquire (Murphy & Beane), New London, Connecticut
for the Employer and Carrier

Before: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for workers' compensation benefits filed by Patrick W. Crowley, a part-time longshoreman, against Logistec of Connecticut, Inc. ("Logistec") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in New London, Connecticut on July 15, 2003, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant

appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer and its insurance carrier, Signal Mutual Indemnity Association. The parties offered stipulations, and testimony was heard from the Claimant. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") A-O, Employer's Exhibits ("EX") 1-4, Joint Exhibits ("JX") 1-2 and ALJ Exhibits ("ALJX") 1-3. Hearing Transcript ("TR") 13. At the close of the hearing, the record was held open for the parties to submit additional deposition testimony and exhibits. TR. 65-69. The Claimant subsequently submitted additional exhibits: an LS-203 and LS-201 labeled CX-O, Dr. Zeppieri's records labeled CX-P, and medical records from the Neurological Group labeled CX-Q. The Employer did not object to the Claimant's post-hearing exhibits and those exhibits have been admitted into evidence. The Employer offered the following additional exhibits: depositions of Drs. Miller marked EX-5, Wainwright marked EX-6, and Zimmerman marked EX-7, along with the curriculum vitae of Dr. Zimmerman marked EX- 8, and treatment notes from Connecticut Behavioral Health Associates marked EX- 9. The Claimant did not object and the post-hearing exhibits offered by the Employer have been admitted into evidence. Thereafter, the parties filed briefs. The record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their closing arguments, I have concluded that the claimant suffered a compensable injury to both shoulders which arose out of his employment at Logistec and that he is, therefore, entitled to an award of temporary partial disability compensation with interest on unpaid compensation, medical benefits and attorney fees. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Background

The Claimant is a fifty year old mental healthworker/counselor who has worked part-time as a longshoreman on the state pier in New London, Connecticut since 1973. TR 14, 17, 24-26. The Claimant's primary employer is First Step, a social service agency for individuals with psychiatric disabilities. TR 25. As a longshoreman, the Claimant has worked as a laborer and a forklift driver. TR 26. The Claimant described his work on the docks as heavy with a significant amount of lifting, pulling and carrying heavy materials. TR 26-29. The Claimant testified that he was required to lift and pull heavy chains, cables and rigging and to band materials together in large bundles. TR 27-29, 33-35. He stated that he was required to stack materials such as wood or copper sheets that could weigh up to 100 pounds each. TR 26-27. The Claimant also operated a large forklift. TR 29-31. He explained that he would be required to climb up and down from the forklift frequently. TR 30. The Claimant stated that he was also required to climb up ladders 60-70 feet in and out of the ship on occasion. TR 31-32.

The Claimant did not have a set work schedule at Logistec and testified that prior to a back injury in late 1999 he worked on average 20-25 hours each week for approximately a six week period and then had a two-week break until the next ship arrived. TR 36-37, 54. The Claimant suffered an injury to his back at the end of October 1999 and was out of work. He received total disability benefits for nine days and temporary partial disability for approximately

five weeks. TR 14, 36, 55. The Claimant was released to return to work without work restrictions in early 2000. TR 55. The Claimant testified, however, that he was experiencing additional pain and discomfort with his hands, arms and shoulders and he reduced the hours he worked as a longshoreman for Logistec in 2000. TR 37-39, 48, 54. His last day of work at Logistec was August 31, 2000. TR 40. The claimant was subsequently diagnosed with bilateral carpel tunnel syndrome. The Claimant was awarded temporary partial and permanent partial disability based upon a 3% impairment of each hand in a decision issued by Judge Daniel Sutton on July 25, 2003.[1]

In addition to pain in his hands and arms, the Claimant also complained of shoulder pain to his family physician, Dr. Ciotola, in July 1997. JX-2 at 12-15; JX-1 at 11-12. The Claimant continued to report shoulder pain in a December 8, 1997 visit and was given exercises to perform. JX-1 at 13. Dr. Ciotola's notes also reflect that the Claimant was reporting shoulder pain along with arm and hand pain in a December 26, 2000 visit. JX-1 at 25; JX-2 at 18. Dr. Ciotola's August 29, 2001 notes refer to bilateral upper arm paresthesias, which Dr. Ciotola testified he believed was more related to the carpal tunnel syndrome that had been diagnosed. JX-1 at 26; JX-2 at 15. Dr. Ciotola's notes indicate that the Claimant was seen again on October 1, 2001 and reported left arm and shoulder pain. JX-1 at 27; JX-2 at 15-16. The Claimant continued to be treated by Dr. Ciotola and his associate, Dr. Johnson, for shoulder pain until March 2002. The Claimant was given a steroid injection in March 2002. JX-2 at 23-24. The Claimant testified that he continues to take 800mg of ibuprofen twice daily to help control his shoulder pain. TR 45.

On January 4, 2001, the Claimant consulted with Dr. Zeppieri on Dr. Ciotola's referral. CX-P. Dr. Zeppieri diagnosed carpal tunnel syndrome and recommended surgery. CX-P. During this period, the Claimant also saw Dr. Wainwright at the request of the Employer for evaluation of his upper extremity condition which his treating physician had diagnosed as carpal tunnel syndrome. CX- G through I. In his deposition, Dr. Wainwright disagreed with Dr. Zeppieri's carpal tunnel diagnosis and his impression was of diffuse upper extremity symptomatic complaints. Dr. Wainwright offered his opinion that the numbness and pain over the forearms the Claimant reported could also be caused by tendonitis of the elbow, or although unusual, from shoulder cuff tendonitis. EX-6 at 15-16.

The Claimant was seen on April 8, 2002 at Thames River Orthopedic Group for his shoulder pain. The Claimant was diagnosed with bilateral shoulder impingement with capsulitis and recommended for physical therapy. CX-K. On May 20, 2002, the Claimant saw Dr. Jeffrey Miller from Thames River Orthopedic Group for follow-up on his shoulder. Dr. Miller continued physical therapy and prescribed anti-inflammatory medication. CX- L. On June 10, 2002, the Claimant was seen again for bilateral shoulder pain. CX-M. The Claimant's physician recommended that he continue with physical therapy. Dr. Miller saw the Claimant again on July 8, 2002 noting the Claimant was now utilizing a home exercise program. Dr. Miller's notes state that strenuous work involving lifting, carrying and working above the shoulders could exacerbate bilateral shoulder tendonitis, lateral epicondylitis and carpal tunnel syndrome. CX-N. Dr. Miller's notes also reflect that the Claimant was not working as a longshoreman, but stated that

[1] The Employer accepted the claim of permanent partial disability for bilateral carpal tunnel syndrome in the case before Judge Sutton.

were the Claimant to return to strenuous activities and find that he was unable to tolerate his symptoms, Dr. Miller would consider further treatment options. CX-N.

At the request of the Employer, the Claimant was also examined by Dr. Gordon Zimmerman who agreed with the diagnosis of impingement syndrome in both shoulders. EX-4; EX-8 at 15-16.

B. Parties Stipulations and Issues Presented

The parties have stipulated that: (1) the Act applies to the claim which is for a repetitive trauma alleging bilateral shoulder injury prior to September 1, 2000; (2) there was an employer/employee relationship between the Claimant and Logistec; (3) an informal conference was conducted on December 4, 2002; (4) the claimant has not returned to his position; (5) the Claimant has engaged in concurrent employment that continues. ALJX-3; TR 5-8.

Regarding the issues presented, the remaining issues include causation, extent of disability, medical care, and attorney fees.[2] ALJX-3. In addition, at the hearing the parties noted that the issue of the appropriate average weekly wage was pending before Judge Sutton in another claim. The parties stated that with regard to the average weekly wage issue, they would be bound by Judge Sutton's decision.[3]

C. Causation

Section 20(a) of the Act provides the Claimant with a presumption that his condition is causally related to his employment if he shows that he suffered harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once this prima facie case is established, the Claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

Logistec concedes that the Claimant has offered sufficient evidence to established a prima facie case and invoke the presumption. Logistec Br. at 8. I turn next to the question of

[2] At the hearing the parties stipulated that notice was an issue in dispute. ALJX-3. However, the brief for the Employer, Logistec, does not address the notice issue. Therefore, Logistec is deemed to have waived this issue. In any event, the Claimant provided notice of a repetitive trauma claim to the shoulders on several occasions, March 2, 2000 (CX-A), December 7, 2000 (CX-D) and May 31, 2002. The Employer controverted the claims as early as January 2, 2001 (CX-E) and has not provided any evidence of prejudice. I find that the claim was timely noticed and filed.

[3] On July 25, 2003, Judge Sutton issued a decision on the Claimant's bilateral hand claim holding that the applicable average weekly wage is $330.04. (2001-LHC-2420). The Sutton decision awarded the Claimant temporary partial disability compensation from August 24, 2000 through February 9, 2001 at a weekly rate of $220.03 and a 3% permanent partial disability compensation benefit under Section 8(c) for 14.64 weeks commencing February 9, 2001 through May 22, 2001 at a rate of $565.58.

whether the Employer has rebutted the presumption. In evaluating an employer's attempt to rebut the Section 20(a) presumption, an employer must produce substantial evidence that the condition was not caused or aggravated by the claimant's employment. *Bath Iron Works Corp. v. Director, OWCP* 31 BRBS 19 (1st Cir.1997); *James v. Pate Stevedoring Co.* 22 BRBS 271 (1989). Evidence is "substantial" if it is the kind that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption, it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier v. Bethlehem Steel Corp*. 16 BRBS 128 (1984). See also *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003) (rejecting requirement that the employer "rule out" causation or submit "unequivocal" or "specific and comprehensive" evidence to rebut the presumption and reaffirming that the "evidentiary standard for rebutting the § 20(a) presumption is the minimal requirement that an employer submit only 'substantial evidence to the contrary.'").

As rebuttal, Logistec offers the report of Dr. Zimmerman dated June 17, 2003. EX 4. Dr. Zimmerman's report notes that he examined Mr. Crowley at the request of Logistec. Dr. Zimmerman diagnosed bilateral rotator cuff tendonitis of the shoulders. However, with regard to causation, his report states that there is no prior history of specific accidents or injuries. The report also notes that there are no pre-existing medical conditions. Dr. Zimmerman's report concludes that the Claimant has a work capacity and he can find "no clear evidence of a relationship between the patient's previous employment and his present complaints of discomfort. There are also several inconsistencies in terms of his reporting this injury after his last date of employment." EX 4.

At his deposition, Dr. Zimmerman testified that he agreed with the treating physician, Dr. Miller's, diagnosis of the Claimant's shoulder condition as bilateral rotator cuff tendonitis or impingement syndrome. EX 7 at 8. He acknowledged that heavy lifting can cause or contribute to this condition. However, Dr. Zimmerman testified that he did not believe the Claimant's shoulder condition was related to his work at the shipyard because the Claimant had not sought medical attention or filed a claim for a shoulder injury until after he left employment. EX 7 at 8-10, 12. Dr. Zimmerman testified that at the time he examined the Claimant the information he possessed indicated only that the Claimant had sought medical attention for his shoulder injury in April and May 2002, almost two years after he left employment at the shipyard. EX 7 at 6, 9, 14-16. Dr. Zimmerman was not aware until his deposition, that the claimant had filed an injury claim for his shoulders in March 2000, while he was still working at the shipyard. EX 7 at 12-14, 19. On cross-examination, Dr. Zimmerman acknowledged that the Claimant's filing a claim for shoulder injuries in March 2000 was consistent with the history that the Claimant provided him regarding increasing shoulder pain in the two years before he stopped working at the shipyard. EX 7 at 19-21.

In rendering his opinion that the Claimant's bilateral shoulder condition was not related to his work at the shipyard, Dr. Zimmerman did not provide a medical analysis or explanation of, or state with a "reasonable degree of medical certainty" why the shoulder injuries were not caused or aggravated by the Claimant's shipyard work. *O'Kelley,* 34 BRBS at 41-42. Rather,

Dr. Zimmerman's opinion that the shoulder injuries were unrelated to the Claimant's work is based solely upon the Doctor's view that a work-related injury claim from a Claimant, who the doctor believed, had neither sought medical treatment nor filed an injury claim until two years after ceasing work, is simply not credible. In the absence of a medical basis for his conclusion that the bilateral shoulder injuries were not related to the Claimant's longshore work, the Doctor's opinion is not sufficient to rebut the Section 20 presumption. In addition, Dr. Zimmerman was incorrect when he stated that the Claimant had not sought treatment for nor filed a claim for a shoulder injury until after the Claimant left employment at the shipyard.

The medical records establish that the Claimant first complained of pain in his shoulders to his primary care physicians, Dr. Ciotola and Dr. Johnson in July 1997. JX 1 at 11; JX 2 at 13-14. At his deposition, Dr. Ciotola reported that the office notes reflected that the Complainant also complained of shoulder pain in December 1997 and was given information on shoulder and neck exercises. JX 1 at 13; JX-2 at 14-15. Dr. Ciotola referred the Claimant to Dr. Wang, a neurologist in September 2000 for complaint of hand and upper extremity pain and numbness. JX-1 at 24; CX- Q. Dr. Wang examined the Claimant in late September, diagnosed carpal tunnel syndrome and suggested the Claimant avoid weight lifting and heavy work, including climbing ladders and handling sharp objects. CX-Q; JX 1 at 13. Dr. Ciotola testified that his office notes of December 26, 2000 reflect the claimant continued to experience difficulties with his hands and was referred to Dr. Zeppieri, a hand surgeon. Dr. Ciotola reported that the December 2000 office note also reflects a complaint of shoulder pain. JX 2 at 20-21. Dr. Ciotola testified that the complainant reported shoulder pain again on August 29, 2001, however the doctor stated that he believed the pain was more related to the carpal tunnel syndrome that had been diagnosed and was the primary focus of treatment at that time. JX 2. Dr. Ciotola recommended only mild lifting, no more than 20 pounds. JX 2 at 21. Finally, Dr. Ciotola stated that the complainant saw his associate, Dr. Johnson, for left arm and shoulder pain on October 1, 2001. JX 2 at 21-22. The office notes reflect that the Claimant saw Dr. Johnson again on March 28, 2002 and received a steroid and pain medication injection to reduce shoulder inflammation and pain. JX 2 at 24-25. Dr Ciotola testified that heavy lifting, pulling and tugging heavy equipment would have an effect that could result in developing or aggravating a rotator cuff condition or capsulitis. JX 2 at 27. He also acknowledged that weightlifting or other types of repetitive motions could aggravate or accelerate shoulder problems. JX 2 at 28.

The Claimant also consulted Dr. Jeffery Miller, an orthopedic surgeon at Thames River Orthopedic Group, for his shoulder condition beginning on April 8, 2002. Dr. Miller recommended a course of physical therapy, which the Claimant completed between April and July 2002. EX 5 at 8-9. Dr. Miller testified that by July 2002 there had been some improvement even though the Claimant was still bothered. However, Dr. Miller stated that Claimant's level of complaints were tolerable as he was working a different job (the First Step job) than the one that had caused or exacerbated his shoulder symptoms. EX 5 at 9. The doctor explained that because the claimant was tolerating his condition, no additional treatment was required. Dr. Miller acknowledged that weight lifting may aggravate chronic rotator cuff tendonitis, but also stated that some weight lifting exercises are used for treatment of rotator cuff tendonitis. EX 5 at 13. Dr. Miller testified that even assuming the Claimant was doing the type of weightlifting exercises that could aggravate his shoulder condition, his job as a longshoreman which involved repetitive lifting and overhead activities and climbing ladders on ships could not be excluded as a

causative factor. EX 5 at 13-19. Finally, Dr. Miller opined that if the Claimant had attempted to return to his job as a longshoreman when he last saw him in July 2002, the doctor would have imposed limits on the Claimant's repetitive reaching and overhead activities. EX 5 at 15. Dr. Miller testified that had the Claimant returned to his position at the shipyard involving repetitive overhead activities, the Claimant's symptoms would eventually get to the "point of intolerability" requiring additional medical treatment. EX 5 at 15.

At the request of the parties, the deposition of Dr. Wainwright taken in preparation for the hearing before Judge Sutton related to the Claimant's carpal tunnel syndrome claim was admitted. Dr. Wainwright disagreed with Dr. Zeppieri's diagnosis of carpal tunnel syndrome and his impression was of diffuse upper extremity symptomatic complaints. EX 6 at 8-10. Dr. Wainwright also stated that although unusual, the Claimant's complaints of pain over the forearms could be caused by shoulder cuff tendonitis. EX 6 at 15-16.

Dr. Miller and Dr. Zimmerman agree that the Claimant has bilateral rotator cuff tendonitis or impingement syndrome. Both physicians testified that the condition can be caused by heavy lifting, pulling, and overhead work, activities in which the Claimant was engaged at his position with Logistec. Dr. Zimmerman failed to provide a medical basis for his opinion that the Claimant's bilateral rotator cuff tendonitis is unrelated to his work, and his opinion that there was not a relationship was premised upon his mistaken belief that the Claimant had neither sought medical attention nor filed a claim for a shoulder injury until two years after he left the job with Logistec. In consideration of these factors, I find that Dr. Zimmerman's opinion is insufficient to rebut the Section 20 presumption. Therefore, I find that the Employer has failed to rebut the Section 20 presumption.

The Employer acknowledges that the Claimant complained to Dr. Ciotola of right shoulder pain in 1997, but attributes that pain to the fact that the Claimant had begun weight lifting at that point. Logistec Br. at 11. The Claimant testified that he had been serious about weightlifting in his late teens, had stopped at 19 years of age and had begun weightlifting again in 1997 or 1998 to get back in shape. TR. 49-51. The Claimant's duties required significant lifting, pulling, and carrying heavy materials, cables and ropes, climbing into and out of a forklift and the ship. TR. 26-32, 34-35. Dr. Miller acknowledged that weight lifting may aggravate chronic rotator cuff tendonitis, but he also explained that some weightlifting exercises are used as a treatment for rotator cuff tendonitis. Dr. Miller testified that even assuming the Claimant was weightlifting, his job as a longshoreman which involved repetitive lifting, overhead activities, and climbing ladders on ships could not be excluded as a causative factor. EX 5 at 13-19. Therefore, I find that although the Claimant's weightlifting may have contributed to his impingement syndrome, his heavy work as a longshoreman can not reasonably be excluded as a contributing factor in his chronic rotator cuff tendonitis. Accordingly, I find that the Claimant's bilateral rotator cuff tendonitis or impingement syndrome is related to his employment at Logistec.

D. Extent of Disability

Logistec argues that even if the Claimant's shoulder injury is related to his longshore work, benefits should be denied because he failed to establish that his shoulder condition caused

him to leave work or prevented his return to work. Logistec Br. at 13. Logistec notes that the Claimant was awarded benefits for his hand injury claim on the theory that he stopped work for that condition and asserts that the medical records show that the Claimant's hand complaints were primary and his upper arm pain complaints secondary. Although acknowledging the Claimant's complaints of upper arm and shoulder pain, the Employer contends that "as between the shoulder and hands it is the hands that are more current as a reason to leave work." Logistec Br. at 14. Logistec argues that the Claimant's shoulder work restrictions were not imposed by either Dr. Ciotola or Dr. Miller until after the Claimant stopped working his longshore job. Logistec Br. at 15. [4]

As noted above, the medical records reflect that the Claimant sought treatment for his shoulder condition in 1997. The Employer is correct that the medical records coincident in time to the last day the Claimant worked at Logistec indicate that the primary focus for both the Claimant and his physicians was on diagnosing and treating his hand condition.[5] However, those records, from September 2000 forward also reflect that the Claimant was complaining of upper arm and shoulder pain. It appears from the medical records that the Claimant's physicians thought that his upper arm pain may be a connected to the diagnosed carpal tunnel syndrome. Only after the Claimant received treatment for carpal tunnel and continued to complain of shoulder pain did Dr. Ciotola focus his treatment on the Claimant's shoulder condition, eventually referring the Claimant to Dr. Miller at Thames Orthopedic Group in April 2002. JX 2 at 21-24, 27. Once the Claimant's physicians targeted and diagnosed his shoulder condition as rotator cuff tendonitis they imposed work restrictions. Although Logistec's concern that the work restrictions for the shoulder condition were not imposed until well after the Claimant left work is understandable, this is due to the fact that the Claimant's physicians did not diagnose his shoulder injury until that time as they were initially concentrating treatment on his bilateral carpal tunnel condition. Under these circumstances, I find that the imposition of work restrictions after the Claimant stopped working, rather than before, do not undermine his claim.

The Claimant testified credibly that on his last day of work at Logistec he was aching all over his shoulders, hands and back and felt he simply could not do the work. TR. 41-42. The Employer has not cited any authority to support the principle that a claimant's inability to perform work may be attributable to only one injury and not two. I find that the Claimant's inability to perform his longshore job at Logistec is due, at least in part, to his shoulder condition and the associated restrictions.

Finally, Logistec contends that the reason the Claimant left work at Logistec in August 2000 was because he was being treated for depression rather than because of a shoulder condition. Logistec Br. at 16. The Employer points to Dr. Ciotola's records of August 1999, in which he recommended the Claimant reduce his work hours in response to his sleeping difficulties. At that point, the Claimant did cut back on his work hours at First Step, his primary employer. JX 1 at 20 and 22. The Employer submitted records from Connecticut Behavioral Health Associates showing treatment for depression beginning in October 1999 and continuing

[4] Unfortunately, the parties' briefs on the extent of disability issue are not particularly helpful. Indeed, as far as I am able to discern, the Claimant did not address the issue.

[5] I find that medical treatment received in September 2000 was sufficiently close in time to Claimant's last day at Logistec to be deemed coincident in time.

until September 2000. The Employer asserts that the ongoing treatment for depression which coincided in time with the Claimant's working only 172 hours for Logistec in the year 2000 provides a plausible explanation for the Claimant's leaving work at Logistec. Review of the treatment records pertaining to depression do not indicate that the Claimant's decision to leave work at Logistec was related to his counseling treatment. EX 9. There is little reference to physical injuries with the exception of noting that the Claimant was out of work for a back injury at one point. The counseling progress notes reflect that the Claimant was treating for various stressors in his life. The Claimant's primary job has been as a counselor at First Step a social service agency for individuals with psychiatric disabilities. TR. 59. The Claimant testified that he has continued to work at First Step since he left work at the pier for Logistec and that his treatment for depression did not prevented him from performing his job at First Step or his job at the pier. TR 59, 62. He testified that he reduced his hours at Logistec after he was released to return to work subsequent to his back injury because he found that he physically had difficulty performing the job. TR 41. He testified that he had pain and numbness in his hands and arms and pain in the shoulder and elbow. TR. 37-40. As noted, the Claimant was subsequently diagnosed with bilateral carpal tunnel syndrome. I find that the Claimant's treatment for depression is unrelated to his reduced hours at Logistec in 2000 and that he reduced his hours as a result of physical limitations and pain in his hands, arms and shoulders. Therefore, I find that the Claimant's reduced work hours at Logistec were related, in part, to his work-related shoulder injuries.

E. Loss of Earning Capacity

The Claimant has continued to work at his primary position as a mental health worker/counselor with First Step. The Claimant has been unable to return to work at Logistec. He has been given lifting restrictions by Dr. Ciotola and Dr. Miller that prevent him from performing his longshore duties. JX 2 at 22-24, 27; EX 5-15.

As compensation for this loss of earning capacity, the Claimant seeks temporary partial disability compensation under Section 8(e) of the Act. TR. 17. The Claimant asserts he is entitled to temporary partial disability benefits from August 24, 2000 the date of injury to the present and continuing. The Claimant contends that pursuant to the parties' agreement the average weekly wage is $330.04 representing the Claimant's Logistec wages and resulting in a weekly benefit of $220.03. The Claimant concedes that the Employer is entitled to a credit for the temporary partial disability benefits paid to the Claimant pursuant to Judge Sutton's award of temporary partial benefits, covering the period August 24, 2000 until February 9, 2001, for his hand injury. Claimant Br. at 15. The Claimant's brief fails to address the impact, if any, of the award by Judge Sutton of permanent partial benefits under the schedule for 14.64 weeks, from February 9, 2001 through May 22, 2001, on any temporary partial compensation benefit award in this case.

The Employer agrees that the Claimant's average weekly wage at Logistec was $330.04 resulting in a benefit level of $220.03. Employer Br. at 17. However, the Respondent argues that in order to avoid a double recovery any award for lost wages "should not commence until expiration of the [schedule] award for benefits under Section 8(c)(3) made by Judge Sutton" for injuries to the Claimant's hands. The Respondent represents that the award for permanent partial

disability for hand injuries began on February 9, 2001 and continued for 14.64 weeks to approximately May 22, 2001. In support of its arguments the Respondent cites *I.T.O. Corp. of Baltimore v. Green and Director, OWCP,* 185 F.3d 239, (4th Cir. 1999), 33 BRBS 139 for the proposition that "there cannot be concurrent awards of a scheduled and nonscheduled benefit for the same injury dates." Employer Br. at 17-18.

Section 8(e) of the Act provides that in a "case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wage before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years." 33 U.S.C. 908(e). The Claimant's wage earning capacity as a longshoreman is zero. The Claimant has continued to work at First Step, his primary job. Therefore, he is entitled to weekly benefits in the amount $220.03 representing two-thirds of his average weekly wages from the Logistec job.

The parties agree that the Employer is entitled to a credit for temporary partial compensation benefits received from August 24, 2000 through February 9, 2001 as a result of Judge Sutton's decision. The Sutton decision awarded the Claimant a weekly benefit of $220.04 under Section 8(e) representing lost wages from his Logistec job from August 24, 2000 through February 9, 2001. Thus, for this period, the Claimant has been fully compensated for his lost wages and I find that the Employer is entitled to a credit for temporary partial compensation benefits received from August 24, 2000 through February 9, 2001. [6]

With regard to the impact of the Sutton decision's award of permanent partial compensation for a schedule award for the hands, Logistec contends that to avoid a double recovery in this case, any benefits awarded cannot begin until expiration of the schedule award, made by Judge Sutton for permanent partial compensation covering the period February 9, 2001 through May 22, 2001. Logistec Br. 17-18. Logistec relies upon the Fourth Circuit's *Green* decision to support its contention that there "cannot be concurrent awards of a scheduled and non-scheduled benefit for the same injury dates." 185 F.3d 239. The Claimant failed to address this important issue in his brief. However, in his opening statement at the hearing, counsel represented that the Claimant was seeking temporary partial disability compensation from May 22, 2001. TR 15, 17. Therefore, I find that the Claimant has waived any objection it may have to providing a credit to Logistec for the permanent partial compensation benefits awarded in the Sutton decision.

Logistec's contention that there may not be concurrent awards of a scheduled and unscheduled benefit is inconsistent with the statute. Section 8 (c) provides that permanent partial disability benefits "shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or (e)…" As a general matter then, the statute expressly permits concurrent awards for permanent partial disability and temporary partial disability. See *Henry v. George Hyman Construction Co.*, 749 F2d 65, 71-72 (D.C. Cir.1984). However, the Fourth Circuit has limited this general principle holding that

[6] In addition to the temporary partial disability benefits awarded pursuant to Section 8(e), Judge Sutton also awarded the Claimant permanent partial disability benefits for a 3% impairment to the hands under Section 8(c)(3) for a period of 14.64 weeks from February 9, 2001 through May 22, 2001 at a weekly rate of $565.58.

"[i]n no case should the rate of compensation for a partial disability or a combination of partial disabilities, exceed that payable to the Claimant in the event of total disability." *Green,* 185 F.3d at 243. The Claimant in the *Green* case sustained injury to both his ankle and shoulder arising out of the same incident and was awarded permanent partial disability compensation for his ankle (a schedule award) and shoulder (unscheduled award) injuries. In order to avoid awarding a benefit rate exceeding the rate for permanent total disability, the Court ordered the shoulder injury (unscheduled) to be paid at the full rate from the beginning of the award period and the ankle (schedule) injury to be paid at a reduced rate for an extended number of weeks to ensure full compensation for both awards.[7] Logistec correctly points out that, in the instant case, unlike the circumstances in *Green*, the schedule award for the Claimant's hand injury has been paid in full. Thus, it is not possible in this case to follow the Fourth Circuit's approach in accounting for and accommodating two partial disability awards. Therefore, in order to avoid double recovery, the award of temporary partial disability benefits for the Claimant's shoulder injury will commence on August 24, 2000 to the present and continuing for a period not to exceed five years with a credit to Logistec for both the temporary partial and permanent partial compensation awards paid in the Sutton decision for his hand injuries.

E. Entitlement to Medical Care

Based on my findings that the Claimant's rotator cuff tendonitis is causally related to his employment with Logistec, he is entitled to reasonable and necessary medical care pursuant to Section 7 of the Act. 33 U.S.C. § 907; *Colburn v. General Dynamics Corp*., 21 BRBS 219, 222 (1988). A Claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates that treatment was necessary for a work-related condition. Drs. Ciotola and Miller both treated the Claimant for his shoulder condition and indicated that the shoulder condition was related to his longshore work. The Claimant is desirous of seeking additional medical treatment for his shoulder injuries. On these facts, I find that the Claimant has established that he is entitled to medical care. Accordingly, I will order the Respondents to provide medical care pursuant to section 7.

F. Compensation Due and Interest

Based on the foregoing findings, the Claimant is owed temporary partial disability compensation pursuant to Section 8(e) of the Act from August 24, 2000 to the present and continuing for a period not to exceed five years, in an amount equal to 2/3 of the difference between the injured employee's average weekly wages before the injury and his wage earning capacity after the injury. The Employer is entitled to a credit for temporary partial and permanent partial benefits paid in the Sutton decision. Since the Claimant's compensation payments are overdue, interest shall be added to all unpaid amounts. The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984) *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for

[7] In *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000), the Board approved the Fourth Circuit's reasoning in *Green*.

its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date of this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132, and the Respondents will be granted 15 days from the filing of the fee petition to file any objection.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1. The Employer, Logistec of Connecticut, Inc., and Carrier, Signal Mutual Indemnity Association, shall pay to the Claimant, Patrick Crowley, temporary partial disability compensation pursuant to 33 U.S.C. 908(e) for the period August 24, 2000 to the present and continuing not to exceed a period of five years at the rate of $220.03, plus interest on all unpaid compensation at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The Employer is entitled to a credit for the temporary partial disability compensation awarded under Section 8(e) and the permanent partial disability compensation awarded pursuant to Section 8(c) in the decision by Judge Sutton.

2. The Employer and Carrier shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related shoulder condition may require pursuant to 33 U.S.C. 907;

3. The Claimant's attorney shall file, within 30 days of receipt of this Decision and Order, a fully supported and fully itemized fee petition pursuant to 20 C.F.R. 702.132(a), sending a copy thereof to counsel for the Employer and carrier who shall then have fifteen (15) days to file any objections;

4. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts